BUNGSAR HILL PROPERTIES SDN BHD & ANOR

v.

PUSPAMBEKHAI RAMANATHAN

HIGH COURT MALAYA, KUALA LUMPUR
RAHMAH HUSSAIN J
[SUIT NO: S4-22-299-92]
22 JUNE 1999

CIVIL PROCEDURE: *Res judicata - Different causes of action and issues - Burden on party pleading res judicata - Sale and purchase agreement terminated - Application for vacant possession not granted to plaintiff because possession entered with consent - Defendant's application for declaration that agreement void struck out - Present action brought by plaintiff to enforce agreement - Whether cause of action and remedy sought in earlier suits similar to present suit - Whether issues similar - Whether present suit ought to be struck out for res judicata - Whether alternative plea for multiplicity of actions sustainable*

CIVIL PROCEDURE: *Pleadings - Defence - Multiplicity of actions - Failure to plead - Whether such defence may still be relied upon*

The plaintiffs and the defendant had entered into a sale and purchase agreement but as a result of the defendant's failure to comply with the terms relating to payment of purchase price, the agreement was terminated. As the defendant refused to deliver vacant possession of the property in question, the plaintiffs commenced an action pursuant to O. 89 of the Rules of the High Court 1980 seeking an order for vacant possession ('the first action'). However, the court adjudged that the summary procedure under O. 89 may only be resorted to where entry into the property in the first instance was unlawful and not where consent to enter had been given as in this case. Prior to the institution of the first action, the defendant filed a different action for a declaration that the said agreement was null, void and unenforceable and also for rescission of the said agreement ('the second action'). The second action was struck out on the plaintiffs' application. Subsequently, the plaintiffs filed a third action to enforce the said agreement but the senior assistant registrar struck out the claim on the grounds of *res judicata* and/or multiplicity of actions. This was the ensuing appeal.

Held:

[1] The burden is on the defendant to identify the issues that have been determined by previous courts but are now brought again before this court. The only determination made by the court in the first action was that the summary procedure was inapplicable in the circumstances of this case and that the plaintiffs must commence a writ action to have the issues tried. That is what the plaintiffs are doing in the present action, that is, to have their claims litigated before this court.

[2] The second action brought by the defendant sought a declaration that the agreement is null, void and unenforceable and also for rescission of the agreement. The plaintiffs, on the other hand, are now enforcing their rights under the agreement against the defendant. As such, the plaintiffs' cause of action and remedy sought against the defendant is clearly different from that sought by the defendant against the plaintiffs in the second action.

[3] The plea of multiplicity of actions cannot stand in this case as such a defence has to be pleaded. In any event, there is in essence only one action before this court as the defendant has failed to show that there are other actions, which are similar in nature and relief sought, pending in other courts.

[Appeal allowed.]

Case(s) referred to:
Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***
Tong Lee Hwa v. Lee Yoke San [1979] 1 MLJ 24 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 89

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 42, p 182

For the plaintiffs - PC Neoh; M/s Suhaimi Khor Zulkifli & Chang
For the defendant - Tony Dhana; M/s Tony Dhana & Co

Reported by Anushana Balasubramaniam

JUDGMENT

Rahmah Hussain J:

This is an appeal against the decision of the learned senior assistant registrar, allowing the plaintiffs' claims to be struck out for *res judicata* and/or multiplicity of actions.

The defendant's main contention is that the present action before this court constitutes *res judicata* and/or multiplicity of actions because there were two previous actions involving the same parties (hereinafter referred to as the first and second actions).

The background facts of the first action are these: The plaintiffs' claims against the defendant arise from the defendant's breach of a sale & purchase agreement dated 30 March 1981 and a Supplementary Agreement dated 10 March 1986. (See exhs. "ST1" & "ST2" – encl. (8)).

The defendant breached the agreement by failing to comply with the terms of payment of the purchase price. As a result the plaintiffs exercised their right under cl. 4 of the supplementary agreement (ST-2) and terminated the agreement. Thereafter they demanded the defendant to deliver vacant possession of the property.

The defendant failed, refused or neglected to deliver vacant possession, hence the plaintiffs commenced an action in the Kuala Lumpur High Court pursuant to O. 89 of the Rules of the High Court 1980 *vide* Originating Summons No. S6-31-3682-88, that is the first action. (See exh. "PR1" – encl. (6)).

At the hearing of the originating summons and the defendant's application to strike it out on 2 January 1990, the defendant's solicitor failed to attend court. An order for vacant possession was thus granted to the plaintiffs. The defendant then applied to set aside the default order and her application came up for hearing on 18 April 1990. (See notes of proceedings in exh. "KAR1" – encl. (38)).

I pause here to mention that learned counsel for the defendant at the outset, had raised a preliminary objection on the filing of an affidavit affirmed by the plaintiffs' public affairs manager, (encl. (38)) which contains the Notes of Proceedings as well as the grounds of judgment of the learned judge in the first action. (See exhs. "KAR1", "KAR2" and "KAR3").

After giving due consideration to the objection and the submission in reply by learned counsel for the plaintiffs, I overruled the objection as I was satisfied that encl. (38) is not an affidavit in reply but an additional affidavit which was filed pursuant to my direction on 16 July 1997 to exhibit the complete set of Notes of Proceedings, as the defendant had produced only partially the notes of proceedings in her affidavit as exh. "PR3" in encl. (6). Furthermore I was of the view that it was important for me to examine the notes of proceedings and grounds of judgment of the first action in order to determine whether or not there is multiplicity of proceedings and on the issue of *res judicata.*

Going back to the background facts of the first action – at the hearing of the defendant's application to set aside the default order, the only issue raised by the defendant and considered by the learned judge was whether O. 89 of the Rules of the High Court 1980, was applicable and whether the order for vacant possession granted in the absence of the defendant's solicitors should stand or be set aside. After hearing arguments from both sides, the learned judge decided in favour of the defendant but only on procedural point.

The plaintiffs being dissatisfied with the said decision given on 3 January 1991 appealed to the then Supreme Court *vide* Civil Appeal No. 02-19-91. Then on 2 March 1994, the Supreme Court reaffirmed the High Court's decision and held that the summary procedure under O. 89 only applies to unlawful entry in the first instance and not in a case where consent has been given, the latter being the case in the first action.

Now, about three (3) months before the first action, the defendant had filed a separate action under Suit No. S5-22-210-88 (hereafter referred to as the "second action") for a declaration that the agreement is null, void and unenforceable and also for rescission of the agreement.

The allegations and averments of the defendant in the second action are *inter alia* that the agreement is in breach of Moneylenders Ordinance 1951, that the person who signed the agreement had no authority. (See exh. "PR2" – encl. (6)).

The defendant under the second action had applied to enter judgment against the plaintiffs but was unsuccessful in her application. The plaintiffs applied to strike out the defendant's claim and was allowed by justice NH Chan on 28 March 1992. (See exh. "KAR3" – encl. (38)).

The defendant being dissatisfied with the decision of the High Court judge had appealed to the Supreme Court *vide* Civil Appeal No. 06-261-1992. The defendant's appeal was heard on 26 April 1995 and was dismissed.

On the affirmation of the agreement, by the court, the plaintiffs are now enforcing their rights under the agreement against the defendant. (See *Halsbury's Laws of England* – 4th edn – vol. 42, p. 182.)

It is now left for this court in the present action (hereinafter referred to as the third action) to decide whether the plaintiffs can succeed in enforcing the very agreement which the court in the second action had held to be valid and enforceable and cannot be rescinded by the defendant, as she had affirmed the said agreement by taking possession of the house. (See exh. "KAR3" – encl. (38)).

So, what is *res judicata*? The law on this plea had been clearly expounded by the Supreme Court in the recent case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 AMR 2559.

> *Res judicata* means a matter adjudged; its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court, the parties are not permitted to litigate the matter again, because the judgment becomes the truth between them. The public policy of the law is that there should be finality in litigation; no one should be vexed twice for the same cause of action.

Now, according to learned counsel for the defendant, *res judicata* is a form of estoppel which bars parties re-litigating the matter, in order to give a finality to litigation. He then refers to the *Asia Commercial Finance case (supra).* Learned counsel further submits that the cause of action or issue involved in this case is termination. He adds, only if the contract can be terminated, can vacant possession be given. Thus both the first action and the third action seek vacant possession based on termination of the contract, and the further claim for damages in this action would already have been covered by forfeiture of the deposit of RM95,000; recovery of the expenses of resale and claim for any shortfall from the instalment payments made by the defendant. (See p. 5 paras. AB exh. "PR3" – encl. (6)).

Besides that, learned counsel for the defendant also enumerated other apparent similarities in these two actions:

(i) The parties in both the first and third actions are the same.

(ii) The cause of action and facts relied thereon in the first and third actions are identical. Both actions:

  (a) Are based on the same sale & purchase agreements;

  (b) claim for vacant possession;

  (c) base the claim for vacant possession on termination of the said agreements; and

  (d) repeat the same facts in paras. 5-10 in the affidavit for action 1 and in the statement of claim for the third action.

(iii) The effect of both actions is the same. It will give the plaintiffs substantially the same relief and there would be no necessity to proceed with the other.

Learned counsel for the plaintiffs on the other hand, submits that the issue of *res judicata* and/or multiplicity of actions does not arise in this case because firstly the question decided and the remedy sought in all the actions are different; secondly the first action was commenced under O. 89 and the **only** determination by the court, including the Supreme Court, is that the summary procedure was inapplicable in the circumstances of this case; thirdly the second action was brought by the defendant against the plaintiffs for a declaration that the agreement is null, void and unenforceable and also for rescission of the agreement; fourthly that the plaintiff's cause of action and remedy sought in the present action is clearly different from the cause of action and remedy sought by the defendant in the second action; lastly that there is only one action before the courts.

In the case of *Tong Lee Hwa v. Lee Yoke San* [1979] 1 MLJ 24, Chang Min Tat FJ had this to say on *res judicata* (paras. F-G righthand side):

> At the hearing of the appeal, it was put to counsel for the appellants that to constitute a *res judicata*, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] MLJ 49 "necessarily and with precision" determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect see how he could succeed.

From the above it is therefore clear, that the burden is on the defendant to satisfy this court with precision, what were the issues determined by the previous courts which the defendant alleges are being brought again before me for determination. In the defendant's entire submission, learned counsel was harping on the point of "termination" which according to counsel is the cause of action which had been determined. Counsel then referred to the decision on 3 May 1990, as confirming the court's determination of "termination" and also to the notes of proceeding of the first action. (See exh. "PR3" – encl. (6)).

However on reading the grounds of judgment of Abdul Razak J for the decision of 3 January 1991 it is clear that the only determination made by the court was that the summary procedure was inapplicable in the circumstances of this case and that the plaintiffs must commence a writ action to have the issues tried. To my mind this is what the plaintiffs are doing in the present action – to have their claims litigated before me.

In respect of the second action, it was brought by the defendant for a declaration that the agreement is null, *void* and unenforceable and also for rescission of the agreement. The defendant's allegations and averments had been dismissed by NH Chan J (as he then was) and was reaffirmed by the Supreme

Court. Thus the plaintiffs are now enforcing their rights under the agreement against the defendant and as such the plaintiffs' cause of action and remedy sought against the defendant is clearly different from the cause of action and remedy sought by the defendant against the plaintiffs in the second action.

In *Thoday v. Thoday* [1964] 1 All ER 341, it was stated (at p. 347) that "... where the cause of action or plea in defence in the second suit is different from that put forward in the earlier suit, then it can be said that the *res* which was the subject of the previous adjudication is not the same *res,* and in such circumstances a party will not normally be held to be estopped from raising the plea."

Lastly the defendant's authority of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* is distinguishable on the facts to the present case. In that case the court was invited to decide on similar issues, ie, the loss and damage suffered by the appellant on the failure or refusal of the finance company to allow the borrower to utilise the loan. In our present case, the judge in the first action having decided that O. 89 applies granted order in terms for vacant possession which he himself subsequently reversed after further argument and held that O. 89 is inappropriate.

Likewise the plea of multiplicity of actions cannot stand in this case as it is trite law that such a defence has to be pleaded. In any event, it is my considered opinion that there is in essence only one action before this court as the defendant has failed to show that there are other actions which are similar in nature and relief sought, pending in other courts.

For the above said reasons I was of the opinion that the defendant had failed to satisfy that she has a defence of *res judicata* and/or multiplicity of actions. As such I allowed the plaintiffs' appeal with costs and set aside the learned senior assistant regisrar's decision made on 24 December 1992.